IP 04-1409-C H/K Beaver v Rick's Boatyard, Inc
Judge David F. Hamilton Signed on 11/15/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KYLE D. BEAVER, DOUGLAS R. HEALEY, ELIZABETH K. YATES, ANGIE M. TURK, JAIME FRIEJE-PENLEY, STACY PENLEY, Plaintiffs, vs. RICK'S BOATYARD, INC., RICK'S CAFE BOATYARD, RICHARD L. ALBRECHT, Defendants.	)	NO. 1:04-cv-01409-DFH-TAB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KYLE D. BEAVER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 1:04-cv-1409-DFH-TAB
	)	
RICK'S BOATYARD, INC., et al.,	)	
	)	
Defendants.	)	

ENTRY ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. *Introduction*

Plaintiffs Kyle D. Beaver, Douglas R. Healey, and Elizabeth Yates, individually and on behalf of all other similarly situated current and former employees, allege that the pay practices of employer Rick's Boatyard, Inc. ("Rick's") violate the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and several Indiana wage laws. Beaver and Healey worked for Rick's, an Indianapolis restaurant and bar, as servers between 2001 and 2003. Yates worked for Rick's as a server as of the date plaintiffs sought class certification. Plaintiffs contend that Rick's violated federal and state law by failing to pay overtime for hours worked in excess of forty hours a week, by deducting from paychecks the costs of uniforms and supplies during training, and by failing to pay wages due upon termination.

On January 20, 2005, plaintiffs filed an unopposed motion for approval of notice and for leave to serve notice on potential party plaintiffs for purposes of a collective action under the FLSA. On March 18, 2005, the court approved plaintiffs' notice with modifications and granted leave to serve the modified notice on potential plaintiffs. Plaintiffs now request that the court certify a plaintiff class on their claims under the Indiana Wage Payment Statute, Ind. Code § 22-2-5-1 *et seq.*, and under the Indiana Wage Claims Statute, Ind. Code § 22-2-9-1 *et seq.* For the reasons stated below, the court GRANTS plaintiffs' motion.

II. *Discussion*

Plaintiffs have framed their motion as one seeking that certain "claims" be certified as a class action. That approach can distract one from the important issue of class definition. The motion is more properly understood as a motion to have a plaintiff class certified to pursue certain claims, and to have the named plaintiffs represent the class. Plaintiffs propose to define the class as "all employees employed by, or formerly employed by, Rick's Boatyard as wait/server staff during the applicable statute of limitations who worked and were not paid for hours worked in excess of forty (40) during a work week." They further seek appointment of Betz & Associates as counsel for this class. Plaintiffs assert that the potential class could exceed 300 employees. Rick's objects to plaintiffs' proposed class certification. Its only specific objection is its contention that a pre-complaint settlement between Rick's and the United States Department of Labor

("DOL") bars those former and current employees who received settlement money from pursuing these state law claims. Docket No. 32, ¶ 5.

Rick's only objection is not persuasive. Rick's and the DOL entered into a settlement agreement during the DOL's investigation of wage violations. The DOL never filed a complaint, and there is no indication that any of the former or current employees who received compensation as a result of the pre-complaint settlement executed a release. Because the settlement was negotiated prior to the filing of any complaint, none of the provisions cited by Rick's bar plaintiffs' claims or preclude class certification. As noted by Rick's, 29 U.S.C. § 216(b) bars an employee from filing an FLSA action where the DOL has already filed a complaint. Even if a complaint had been filed, it is doubtful that the provisions cited by Rick's would divest plaintiffs of their ability to pursue their claims. Fewer than one third of the proposed class members received settlement money, and Rick's has offered no evidence that any signed a release sufficient to preclude a future right of recovery. See *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 307 (7th Cir. 1986) (employees who cashed checks received from a settlement between their employer and the DOL did not release employer from liability). Thus, the only inquiry for the court is whether the required conditions exist for class certification.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, class certification is proper where a court determines that the proposed class representatives can satisfy all four requirements of Rule 23(a) and at least one of

the categories of Rule 23(b). See *Thompson v. Doctors & Merchants Credit Service, Inc.*, 2002 WL 31854974, *2 (N.D. Ill. 2002), citing *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982). Rule 23(a) requires a showing that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

Where the Rule 23(a) threshold is met, the proposed class must also satisfy at least one branch of Rule 23(b): (1) the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for defendants or a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other parties to the adjudication or substantially impair or impede their ability to protect their interests; (2) defendants have refused to act on grounds generally applicable to the class; or (3) questions of law and/or fact common to the plaintiffs predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

At the threshold, there is a problem with plaintiffs' proposed definition of the class: "all employees employed by, or formerly employed by, Rick's Boatyard as wait/server staff during the applicable statute of limitations who worked and were not paid for hours worked in excess of forty (40) during a work week." The problem is that neither the court, the parties, nor current and former employees of Rick's can tell whether a person is in the class without deciding the merits of that person's claims. In other words, the proposed definition is a "fail-safe" class, one that allows what has been described as "one-way intervention" that should not be permitted. See *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) (reversing such a class certification); *Bledsoe v. Combs*, 2000 WL 681094, *4 (S.D. Ind. March 14, 2000) (rejecting class similarly defined in terms of prisoners who were subjected to strip searches under circumstances where such searches were unreasonable and unconstitutional; the proposed class was "unmanageable virtually by definition"); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997) (denying class certification where determining class membership would require individualized determination on the merits of the claim); *Indiana State Employees Ass'n v. Indiana State Highway Comm'n*, 78 F.R.D. 724, 725 (S.D. Ind. 1978) (denying class certification where "it would be impossible for the Court to ascertain whether or not a given person is a member of the class until a determination of ultimate liability as to that person is made"); *Dafforn v. Rousseau Associates, Inc.*, 1976-2 Trade Cas. ¶ 61,219 (N.D. Ind. 1976) (denying certification of proposed "fail-safe" class defined as all persons who paid illegally fixed brokerage fees); see also *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir.

1980) (affirming denial of class certification where class was unmanageable; determining whether any individual child was a member of proposed class would require extensive battery of educational and psychological tests); Manual for Complex Litigation § 21.222 (4th ed. 2004) (class definition must be "precise, objective, and presently ascertainable" so that it is clear who is entitled to relief, who is bound by judgment, and who is entitled to notice); 7A Wright & Miller, Federal Practice & Procedure 2d § 1760 at 140 (3d ed. 2005) (class must be defined in way that it is administratively feasible for court to determine whether particular individual is a member).

Plaintiffs' proposed definition is especially troublesome because plaintiffs allege in their own complaint that Rick's deliberately kept false records and that the plaintiffs' time records at Rick's show they worked only 79.99 hours per two week period when in fact they worked much more. It is not unusual in wage/hour cases to have plaintiffs allege and sometimes prove that the employer's records do not accurately reflect the hours actually worked. But that issue is a problem for trial on the merits. If one cannot tell whether a person is a member of the class by examining the readily available records, that fact is a warning that a better class definition is probably needed.

Also, plaintiffs' reference to "the applicable statute of limitations" punts the question to the court. This is an adversarial system in which counsel are supposed to address such questions in the first instance and present disputed

issues for the court to resolve. In the absence of help from counsel, the court assumes that the applicable period is the two year limit under Indiana Code § 34-11-2-1, which applies to an "action relating to the terms, conditions, and privileges of employment except actions based upon a written contract," including claims for wages. That statute is more specific and more recent than the six year statute of limitations applied to similar claims in *International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 346 F.2d 242, 244-45 (7th Cir. 1965) (borrowing six-year Indiana statute applicable to actions on oral contracts for suit for wages alleged to be due under collective bargaining agreement), *aff'd on other grounds*, 383 U.S. 696, 706-07 (1966) (borrowing same statute but treating claim as one arising under federal law); see also *Atchley v. Heritage Cable Vision Associates*, 101 F.3d 495, 502 (7th Cir. 1996) (recognizing that Supreme Court effectively overruled portion of Seventh Circuit decision in *Hoosier Cardinal*).[1]

A more precise, objective, and readily ascertainable definition of the class in this case is all persons who were employed by Rick's Boatyard as waiters or servers at any time between August 26, 2002 (two years before the complaint was filed) and April 8, 2005 (the date plaintiffs filed their motion for class certification).

[1]The two-year statute for actions relating to terms and conditions of employment was first enacted in 1977 as Indiana Code § 34-1-2-1.5, see 1977 Ind. Acts P.L. 328 § 1, and was recodified in 1998 as Indiana Code § 34-11-2-1, see 1998 Acts P.L. 1, § 6.

Plaintiffs contend that they have met the Rule 23(a) threshold requirements and contend that they qualify under all three Rule 23(b) conditions. [Docket No. 29.] In deciding a class certification motion, the court is not obligated to treat as true all allegations in support of certification. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). In this case however, Rick's does not contest plaintiffs' skeletal showing in support of class certification. With respect to numerosity, Rick's has even offered evidence weighing in favor of certification.

Numerosity means that the class is so large "that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Where the membership of the proposed class is at least forty, joinder is ordinarily deemed impracticable and the numerosity requirement is met. *Johnson v. Rohr-Ville Motors, Inc.*, 189 F.R.D. 363, 368 (N.D. Ill. 1999). Plaintiffs assert that the proposed class could surpass 300 individuals. Rick's submission in opposition to class certification demonstrates a potential class that encompasses at least ninety-one members. Docket No. 38, Ex. A. Joinder of a class even this large would be impracticable, and the court's somewhat broader definition is likely to encompass an even larger number. Plaintiffs satisfy the numerosity requirement.

Plaintiffs likewise meet the commonality and typicality requirements. Rule 23(a)(2) requires questions of law or fact common to all class members while Rule 23(a)(3) requires that the claims of the proposed class representative be typical of the claims of the class. See Fed. R. Civ. P. 23(a)(2) and (3). The typicality

requirement is closely related to the commonality requirement. *Rosario v. Livaditis*, 963 F. 2d 1013, 1018 (7th Cir. 1992). "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Id.* A claim is typical "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Id.*, quoting *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F. 2d 225, 232 (7th Cir. 1983). Here, the claims of all the putative class members arise out of Rick's salary and pay practices. Further, the relief available to plaintiffs and the proposed class is similar in that all claim to have suffered a monetary loss as a result Rick's practices. The plaintiffs' proposed class meets the Rule 23(a) commonality and typicality requirements.

The fourth element under Rule 23(a) is whether the named representatives of the class are able to fairly and adequately protect the interests of the class. This requirement is satisfied where plaintiffs have a stake in the outcome sufficient to ensure zealous advocacy and do not have antagonistic or conflicting claims with other class members, and where counsel for the named plaintiffs is experienced, qualified, and generally able to conduct the litigation. *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, 2000 WL 1774091, *5 (N.D. Ill. 2000), citing *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993).

As discussed above, the plaintiffs and their proposed class share similar claims and have a similar stake in the outcome of this case. Nothing before the

court suggests any hint of antagonism or conflicting claims, and the court is satisfied that plaintiffs' counsel are sufficiently experienced and capable to conduct the present litigation. Plaintiffs satisfy the requirements of Rule 23(a).

B. *Rule 23(b)(3)*

Unchallenged by Rick's, the plaintiffs contend that the proposed class qualifies for class certification under all three of the alternative prongs of Rule 23(b). Because the plaintiffs seek primarily monetary relief, Rule 23(b)(2) is not appropriate. See *Liberty Mut. Ins. Co. v. Tribco Const. Co.,* 185 F.R.D. 533, 542 (N.D. Ill. 1999) ("class certification under subsection (b)(2) generally is not appropriate when a party primarily seeks monetary relief"). The court also doubts that Rule 23(b)(1) supports certification here, at least absent a more specific showing by the plaintiffs.

Rule 23(b)(3) provides the most solid basis for certification. Common questions of law and fact exist and predominate over any other questions affecting individual class members. The same conduct that gives rise to the named plaintiffs' claims gives rise to claims of the proposed class. There is no sign of unique defenses that could be asserted against the individual class members. In light of the size of the potential class and the absence of indications that individual members of the proposed class have any unique interest in pursuing their claims individually, a class action is superior to other available methods for the fair and efficient adjudication of this controversy. See *O'Brien v. Encotech*

Construction Services, 203 F.R.D. 346, 352 (N.D. Ill. 2001) (noting that efficiency is better served by concentrating litigation of state and federal claims related to a common set of facts). Accordingly, plaintiffs qualify for class certification under Rule 23(b)(3).[2]

[2]This result is not inconsistent with this court's earlier decision denying class certification on state law wage claims pendent to FLSA claims in *Veerkamp v. U.S. Security Associates, Inc.*, 2005 WL 775931 (S.D. Ind. March 15, 2003). These cases simply have factual distinctions that result in differing outcomes. The defendant in *Veerkamp* vigorously contested class certification, challenging in particular the Rule 23(b)(3) requirements. Rick's has not raised any arguments on that score in this case. Also, in *Veerkamp*, plaintiffs had worked at several different sites, were subject to different managers, and were subject at least arguably to different policies and practices. In this case, the proposed class consists of former and current employees at one restaurant. Also, different claims under different state statutes were at issue. Accordingly, the court has exercised its discretion here to certify the proposed class in the face of only one unpersuasive argument to the contrary.

III. *Conclusion*

The plaintiffs have met the requirements of Rule 23(a) and 23(b)(3) for certification of a plaintiff class. Thus, the court grants plaintiffs' motion to certify a class, as modified, to consist of all persons who were employed by Rick's Boatyard as waiters or servers at any time between August 26, 2002 and April 8, 2005, to pursue claims under Indiana Code § 22-2-5-1 *et seq*. and Indiana Code § 22-2-9-1 *et seq*. The court also appoints Betz & Associates as counsel for the class represented by plaintiffs Beaver, Healey, and Yates. The court further orders plaintiffs to file a proposed notice for the court's consideration **no later than November 30, 2005**, and after consultation with defense counsel. Rick's shall file objections to the proposed notice, if any, no later than seven days after service of plaintiffs' proposed notice.

So ordered.

Date: November 15, 2005

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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